

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

NORMAN W. WAITT, JR.,

Plaintiff,

vs.

THOMAS C. LEVITT,

Defendant and Third-Party  
Plaintiff,

vs.

MATTHEW L. RIX and STEVEN W., SELINE,

Third-Party Defendants.

No. **C00-4087-MWB**

**ORDER ON MOTION FOR  
REIMBURSEMENT OF  
DEPOSITION FEES**

NORMAN W. WAITT, JR.,

Plaintiff,

vs.

SPEED CONTROL, INC., JAMES H.  
BERGLUND; EUGENE F. HUSE, JR.; NED  
D. MILLS; ROBERT N. TOMCHUCK; and  
LOUIS E. BARTON;

Defendants.

No. **C00-4060-MWB**

On April 3, 2002, the defendant Thomas C. Levitt filed a motion seeking reimbursement of certain expert witness fees and costs in connection with the depositions of Kevin Culhane and defendant Levitt (Doc. No. 159 in C00-4060; Doc. No. 179 in C00-4087). The motion was not resisted timely by the plaintiff.

By order dated April 23, 2002 (Doc. No. 162 in C00-4060; Doc. No. 182 in C00-4087), the court directed the movant to file a memorandum of authorities in support of his request for reimbursement of these fees and costs, and directed the plaintiff to file a response.

The movant filed his brief on April 30, 2002 (Doc. No. 166 in C00-4060; Doc. No. 186 in C00-4087), and the plaintiff filed his resistance on May 7, 2002 (Doc. No. 168 in C00-4060; Doc. No. 188 in C00-4087). The motion is now ready for decision.

Levitt seeks reimbursement for the fees billed by Levitt's expert Kevin Culhane, in connection with his deposition by the plaintiff. He seeks an order directing the plaintiff to reimburse him in the amount of \$9,350.00, representing the deponent's fees incurred in traveling to, preparing for, and attending the deposition, and return travel home. Levitt also seeks reimbursement in the amount of \$413.20, representing long distance telephone charges for the telephonic deposition of Levitt taken by the plaintiff.

Addressing the latter request first, the court recalls, both independently and from its prior order of December 27, 2001, that Levitt's deposition was taken telephonically primarily due to the tardiness of the plaintiff in noticing the deposition. Levitt had already been deposed for seven hours, as allowed by the Federal Rules of Civil Procedure. After the discovery deadline had passed, the plaintiff noticed Levitt for a supplemental deposition. The court allowed the deposition, but ordered that at Levitt's option, the deposition could be taken by telephone. Levitt so elected, and his deposition was taken by telephone. One of Levitt's attorneys went to California, and appeared for the deposition at Levitt's location. Another of his attorneys remained in Sioux City, and was present at the deposition by telephone. The plaintiff objects to paying the cost for the Sioux City attorney to participate by telephone, as she did none of the questioning during the deposition. However, Levitt is not seeking reimbursement for the travel cost for one of his attorneys to travel to California, nor were the plaintiff's attorneys required to expend time and money traveling to California. The telephonic deposition saved all parties time and money. The court finds Levitt's request for reimbursement of these telephone expenses to be eminently reasonable, and **grants** the motion. The plaintiff shall reimburse the defendant in the amount of **\$413.20**, which payment shall be made to Levitt's attorneys by **May 27, 2002**.

The court now turns to Levitt's request for reimbursement of expert fees and expenses in connection with the deposition of Mr. Culhane. There is no disagreement that Levitt is

entitled to reimbursement of his expert's fees for deposition time, nor is there any contention that Mr. Culhane's hourly rate of \$275.00 per hour is unreasonable. (*See* Plaintiff's Resistance) Mr. Culhane's deposition transcript reflects that the deposition commenced at 9:00 a.m. and concluded at 2:10 p.m., for a total of five hours and ten minutes. Thus, there is no dispute Levitt is entitled to reimbursement in the amount of \$1,420.83 (representing \$275.00 times 2 hours 10 minutes).

The dispute concerns the other fees for which Levitt seeks reimbursement, representing the following time spent by Mr. Culhane:

Research re case and distinction between business and legal advice. .50 hours.

Telephone calls to Ms. Koob re deposition and related matters. .30 hours.

Prepare for deposition on case; pull opinion white paper, Rocky Mountain report. 2.00 hours.

Travel to Omaha, Nebraska via Denver for deposition; travel from Omaha to Sioux City (5:30 a.m. PDT to 9:30 p.m. CT); read and analyze depositions of Mr. Levitt and Mr. Waitte [sic] en route in preparation for deposition. 14.00 hours.

[T]ravel from Sioux City, Iowa to Omaha[,] Nebraska; return to Sacramento via Phoenix (7:30 a.m. CT to 12:30 a.m. PDT). 13 hours.<sup>1</sup>

Motion, Ex. C.

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<sup>1</sup>This number is derived from taking the 19 hours billed by Mr. Culhane on 10-10-01, and subtracting one hour of preparation time with Levitt's attorney, for which Levitt is not seeking reimbursement, and five hours of deposition time. (*See* Motion, Ex. C)

Although some courts disagree,<sup>2</sup> most courts have held an expert's preparation time is compensable. As explained by the United States District Court for the Eastern District of Missouri:

Rule 26(b)(4)(C), Fed. R. Civ. P., . . . provides that “unless manifest injustice would result,” a court “shall” require a party seeking discovery to pay the expert “a reasonable fee” for time spent in “responding” to discovery under the subdivision. Although there are conflicting decisions, *see, e.g., Benjamin v. Gloz*, 130 F.R.D. 455, 457 (D. Colo. 1990), the weight of authority holds that Rule 26(b)(4)(C) permits recovery of fees for an expert's preparation time and travel time in connection with his deposition. That is to say, preparation time and travel time are time spent “responding” to discovery. *See, e.g., Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 646-47 (E.D.N.Y. 1997); *Hose v. Chicago and North Western Trans. Co.*, 154 F.R.D. 222, 228 (S.D. Iowa 1994)<sup>3</sup>; 8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2034 (2d ed. 1994) (“[I]t is hard to deny that the deposition-preparation process, like the deposition itself, requires additional effort by the expert for which he or she is likely to insist on being paid.”).

*Emmenegger v. Bull Moose Tube Co.*, 33 F. Supp. 2d 1127, 1136 (E.D. Mo. 1998) (footnote added). *See Collins v. Village of Woodridge*, 197 F.R.D. 354, 357 (N.D. Ill. 1999) (“[T]he better reading of Rule 26(b)(4)(C) is that the expert's reasonable fees for preparation time are recoverable by the party who tendered the expert. *See Hose v. Chicago and North Western Transportation Co.*, 154 F.R.D. 222, 227-28 (S.D. Iowa 1994); *American Steel Products Corp. v. Penn Central Corp.*, 110 F.R.D. 151, 153 (S.D.N.Y. 1986); *Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc.*, 553 F. Supp. 45, 53 (S.D.N.Y. 1982) (all ordering party

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<sup>2</sup>*See, e.g., S.A. Healy Co. v. Milwaukee Metrol. Sewerage Dist.*, 154 F.R.D. 212, 214 (E.D. Wis. 1994) (preparation time reimbursed only in complex cases); *Rhee v. Witco Chem. Corp.*, 126 F.R.D. 45, 47-48 (N.D. Ill. 1989) (“An expert's deposition is in part a dress rehearsal for his testimony at trial and thus his preparation is part of trial preparation. One party need not pay for the other's trial preparation. The court finds that a deposing party need not compensate the opposing party's expert for time spent ‘preparing’ for deposition.”).

<sup>3</sup>*Hose* was decided by the trial court in the present case, the Honorable Mark W. Bennett, when he was a United States Magistrate Judge in the Southern District of Iowa.

deposing experts to pay reasonable fee for time spent preparing).”). The *Collins* court discussed at length the history behind amendments to Rule 26 that were made for the purpose of reducing the need for expert depositions, and concluded that requiring the depositing party to reimburse the expert’s fees for preparation time was consistent with that purpose. *See id.*

This court agrees that an expert’s preparation time is compensable by the depositing party. This does not end the inquiry, however, as the court still must determine what amount is reasonable under the facts of this case. Levitt is seeking reimbursement for nearly 30 hours of preparation time for a five-hour deposition. The court finds this amount of time to be beyond what is reasonably necessary and appropriate in the present case, which does not involve complex medical opinions, products liability or scientific analyses, or thousands of pages of technical manuals and documents. Rather, as Levitt points out, Mr. Culhane was “retained to provide opinions regarding Mr. Levitt’s conduct pertaining to Mr. Waitt.” (Levitt’s brief, p. 7) While the court agrees it was necessary for Mr. Culhane to review the deposition transcripts from the plaintiff and Levitt, the court finds 30 hours is excessive to prepare for this deposition. In addition, despite those courts that have taken a different view, this court finds it to be inappropriate for Levitt to be reimbursed for Mr. Culhane’s travel time. The court finds it would be reasonable for the plaintiff to reimburse Levitt for the deposition time, and for 10 hours of preparation time.

Accordingly, Levitt’s motion with regard to Mr. Culhane’s fees is **granted in part and denied in part**. The plaintiff is ordered and directed to reimburse Levitt in the total amount

of **\$4,170.83** for Mr. Culhane's deposition fees, which payment shall be made to Levitt's attorneys by **May 27, 2002**.

**IT IS SO ORDERED.**

**DATED** this 15th day of May, 2002.

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PAUL A. ZOSS  
MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT